

2001

Paul F. Bliss dba Bliss Construction Co., Inc. v. Sky High Incorporated : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gregory B. Hadley, James K. Haslam; Hadley and Associates; attorneys for appellee.

Jeffery R. Price, Michael E. Bostwick; Babcock, Bostwick, Scott, Crawley and Price; attorneys for appellant.

Recommended Citation

Reply Brief, *Bliss v. Sky High Incorporated*, No. 20010299 (Utah Court of Appeals, 2001).
https://digitalcommons.law.byu.edu/byu_ca2/3239

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

**PAUL F. BLISS dba BLISS
CONSTRUCTION CO., INC.,**

Plaintiff, Counterclaim Defendant,
and Appellant

vs.

**SKY HIGH INCORPORATED, a Utah
Corporation; dba ONE MAN BAND;
DOES 1-20,**

Defendants, Counter-claimants, and
Appellee.

Civil No. 20010299-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from a Judgment entered in the Fourth Judicial District Court,

Salt Lake County, State of Utah Honorable Judge Gary D. Stott Presiding

Mr. Gregory B. Hadley
Mr. James K. Haslam
HADLEY & ASSOCIATES
2696 North University Avenue, #200
Provo, Utah 84604
Attorneys for Appellee
Sky High Incorporated dba
One Man Band

Mr. Jeffery R. Price
Mr. Michael E. Bostwick
BABCOCK BOSTWICK SCOTT
CRAWLEY & PRICE
57 West South Temple, 8th Floor
Salt Lake City, Utah 84101
Attorneys for Appellant
Paul F. Bliss dba Bliss Construction
Co., Inc.

FILED
Utah Court of Appeals

JAN 14 2002

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

**PAUL F. BLISS dba BLISS
CONSTRUCTION CO., INC.,**

Plaintiff, Counterclaim Defendant,
and Appellant

vs.

**SKY HIGH INCORPORATED, a Utah
Corporation; dba ONE MAN BAND;
DOES 1-20,**

Defendants, Counter-claimants, and
Appellee.

Civil No. 20010299-CA

Priority No. 15

REPLY BRIEF OF APPELLANT

Appeal from a Judgment entered in the Fourth Judicial District Court,

Salt Lake County, State of Utah Honorable Judge Gary D. Stott Presiding

Mr. Gregory B. Hadley
Mr. James K. Haslam
HADLEY & ASSOCIATES
2696 North University Avenue, #200
Provo, Utah 84604
Attorneys for Appellee
Sky High Incorporated dba
One Man Band

Mr. Jeffery R. Price
Mr. Michael E. Bostwick
BABCOCK BOSTWICK SCOTT
CRAWLEY & PRICE
57 West South Temple, 8th Floor
Salt Lake City, Utah 84101
Attorneys for Appellant
Paul F. Bliss dba Bliss Construction
Co., Inc.

ARGUMENT

A. Bliss' Appeal was Proper and Timely filed.

Paul F. Bliss dba Bliss Construction Co., Inc. (Bliss) filed its first Notice of Appeal on January 16, 2001. **Record at page 508.** The Supreme Court contacted Bliss' counsel to allow Bliss to withdraw its Notice of Appeal until the trial court could rule on Bliss' pending motions. Bliss complied with this request and withdrew its Notice of Appeal on February 13, 2001. **Record at page 553.** The trial court ruled on Bliss' pending motions on March 7, 2001, and the matter then became ripe for an appeal. Bliss filed its Amended Notice of Appeal on March 27, 2001. **Record at page 588.**

Procedurally, Sky High Incorporated (Sky High), moved to have the Arbitrator's award confirmed on September 13, 2000. **Record at page 369.** The trial court signed the Order confirming the Arbitrator's Award on or about September 26, 2000. **Record at page 371.** The trial court issued its Ruling on Bliss' Motion to Set Aside the Judgment on December 7, 2001. **Record at page 454.** The trial court entered its Order denying Bliss' requested relief pursuant to Rule 60(b) of the Utah Rules of Civil Procedure on January 2, 2001. **Record at page 463.** The trial court also signed an Order Releasing Mechanic's Lien on January 2, 2001. **Record at page 474.** Bliss then filed a Motion to Alter or Amend the December 7, 2000, Ruling or Motion to Stay of Execution of Judgment Pending Appeal on January 2, 2001. **Record at page 465.** The trial court denied Bliss' Motion on February 23, 2001. **Record at page 572.** The Order from the trial court's ruling was signed on March 7, 2001, and the Amended Notice of Appeal was filed March 27, 2001. **Record at pages 575 and 588.** Nothing in the procedural history precludes Bliss from filing and perfecting an Appeal of the trial court's orders.

B. Order Confirming the Arbitrator's Award was not Harmless Error.

It is undisputed that by the trial court signing the proposed order confirming the Arbitrator's Award on September 26, 2000, Bliss was not allowed the 20 days notice specified in the statute. Sky High asserts that the confirmation is "absolutely mandatory upon certain conditions, including the passage of the 20 days." Sky high also claims that the passage of the 20 days is unimportant and does not require the trial court to wait. The statute specifies that; "[u]pon motion to the court by any party to the arbitration proceeding for the confirmation of the award, and 20 days notice to all parties, the court shall confirm the award." Utah Code Ann. § 78-31a-12. The allegation is that the statutory language does not require 20 days notice to all parties before the trial court confirms the award.

In this case, a statute set the time for submitting the matter to the trial court for its decision, 20 days. The trial court clearly did not give all parties to fully brief the matter before it before signing the Order of September 26, 2000. The Court should set aside paragraphs 2 and 6 of the Order Confirming Arbitration Award.

Rule 4-504 of the Utah Code of Judicial Administration provides for a uniform procedure for filing motions, supporting memoranda and documents with the court. In the *Scott v. Majors*, 980 P.2d 214, 217 (Utah App. 1999), this court explained the Rule as follow:

A correct reading of the unambiguous language of the last sentence of the rule is that the parties may not assume that a matter will be presented to the judge for decision by the clerk's office unless a party notifies the clerk of the court that the matter is *fully briefed (or at least all parties have had ample opportunity to brief their arguments)* and ready for decision.

Id. (Emphasis added). In this matter, all parties did not have an ample time to brief this argument.

C. The Arbitrator did not have Authority to make a Determination of Bliss' Lien.

It must be pointed out here that the Award included only evaluation of the contract claims of both parties. Nowhere in the Award does the Arbitrator evaluate the value of the work claimed by Bliss and determine if Bliss complied with the lien statute. The only mention of the lien is contained in the Answer to Issue No. 3 on page 3 of the Award and states: "The Court should order Bliss Construction to release its mechanic's lien, as it has no enforceable claim against Sky High." **Record at page 277.** Nevertheless, Sky High included a release of Bliss' mechanic's lien in the order confirming the Award. As argued by Sky High now, the trial court released Bliss' mechanic's lien, not the Arbitrator. The question is then raised as to why Sky High included paragraphs 2 and 6 in the Order confirming the Award when no such award was made by the Arbitrator? The September 26, 2000, Order as written and entered, exceeded the Arbitrator's Award.

Sky High claims that it was harmless error for the trial court to confirm the Award. Bliss' statutory rights pursuant to the mechanic's lien statute by the trial court's confirming the Award with the Order prepared by Sky High's counsel, which included paragraphs 2 and 6. Bliss is not complaining about its contract claims being determined by the Arbitrator and confirmed by the trial court.

Sky High asserts that Bliss should have made a motion to vacate or modify the Award pursuant to Utah Code Ann. § 78-31a-12. The Arbitrator's Award did not release Bliss' mechanic's lien, but rather made a suggestion to the trial court. It was not until the trial court actually signed the Order on September 26, 2000, that Bliss' statutory rights were affected. Bliss had no reason to vacate or modify the Arbitrator's decision on all of the contract claims.

However, Bliss has a great deal of interest in the trial court's error in terminating its mechanic's lien rights. That termination was not harmless error. The trial court's releasing Bliss' mechanic's lien should be reversed.

D. Bliss' Mechanic's Lien claim is a Statutory Right not a Contractual Right.

Sky High does admit that a mechanic's lien claim is statutory right and not a contractual right. However, Sky does try to twist the case law to say that the contract is the measure of damages under a mechanic's lien. The case law in Utah is that the value of the work is the measure of damages. The contract may be used in that analysis, but is not conclusive. Otherwise, the case law cited by Sky High, concerning implied contract would have no value, because the terms were not agreed upon.

E. The Value of Bliss's Mechanic's lien was not Determined by, Either the Arbitrator or the Trial Court.

Bliss performed extra work on the project that was not included in the contract, on the One Man Band restaurant in Nephi, Utah (Project), for which Bliss was not paid. The arbitration Award clearly determined the party's contract right and each's failure to follow the contract provisions for making a claim against each other. What the arbitration Award did not evaluate or determine, was the value of the work Bliss did on the Project.

Sky High now asserts that the arbitration portion of the contract was valid and enforceable. Sky High argued that Bliss had waived its right to seek arbitration in its Motion to Reconsider filed in this matter on or about May 4, 2000. Further, It argued that neither Bliss nor Sky High ever requested arbitration. The Arbitrator found that neither party complied with the contract as it related to their claims. A close review of Sky High's Memorandum in Support of

Notion for Reconsideration or Clarification, will demonstrate its position on the matter of arbitration. The contract language at General Condition of the Contract for Construction, Exhibit B to the Appellee's Brief paragraph 4.3.2 allows either arbitration or litigation with the need for a decision by the architect as a condition precedent for specific types of events. Paragraph 5 set forth that "claims relates to a mechanic's lien." **Record at page 167.** Bliss' claim relates to a mechanic's lien.

Despite what Sky High claims about the arbitration Order signed by the trial court, Bliss objected to the inclusion of the mechanic's lien claim in the arbitration. The trial court signed the Order in the face of Bliss' objections. The trial court was the venue where that mechanic's lien claim rested. The arbitrator did not receive any evidence as to the value of Bliss' claim pursuant to the mechanic's lien.

Virtually of the authorities cited by Sky High in its Brief under section V, explained that there must be either a contract or an implied contract with the owner in order to initiate a lien. In other words, the owner must have requested the entity making the mechanic's lien claim, to enter the property to improve that property. One cannot enter a property and do work without the owner's invitation and expect to be paid for that work. Sky High cites many cases from other jurisdiction to support its arguments. However, there is adequate legal precedent in Utah to evaluate and determine the issues in this case. Bliss would agree that there should only be one satisfaction of the debt owed by the owner to a contractor. However, if the owner requests change orders, the contract price and the value of the work performed increases as well. Once again the Arbitrator determined that neither party complied with the contract procedure to maintain an action based on the contract. Nevertheless, Bliss improved the real property and

should be compensated for the value of the work performed. Bliss was terminated from the Project prior to being able to complete the Project and receive full compensation for its labor and materials.

F. Bliss' Due Process Rights were Deprived.

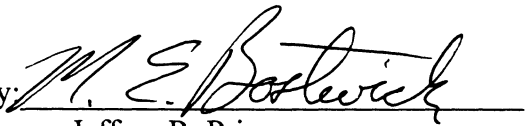
The Arbitrator's focus was on the contract and not on Bliss' mechanic's lien. No evidence was allowed concerning the requirements of the statute and Bliss' compliance with those requirements. No evidence was allowed concerning the value of the work performed by Bliss. The sole issue reviewed by the Arbitrator was the contract claim made by both parties. No information as to the extra work or the payments made was presented. As can be seen from the Award, the Arbitrator determined the contract issues. In fact, the only contract issues that were determined by the Arbitrator were those that related to technical compliance with the contract claims process. All other issues were disregarded by the Arbitrator. Therefore, Bliss' mechanic's lien claims have not been properly presented to a fact finder that is authorized to receive such evidence and make a determination. This is a deprivation of a property right. Bliss had a mechanic's lien claim until January 2, 2001, when the trial court incorrectly released its mechanic's lien. The trial court's order should be reversed.

CONCLUSION

Pursuant to the facts and argument set forth in Bliss' Brief and herein, Bliss hereby requests that this Court reverse the trial court's Order as to paragraphs 2 and 6 of the Judgment executed by the trial court on or about September 26, 2000. That Bliss be allowed to present its mechanic's lien claim in accordance with Utah Code Ann. § 38-1-1 *et seq.*, together with all further relief the Court deems just and appropriate under the circumstances.

Respectfully Submitted this 14th day of January 2002.

BABCOCK, BOSTWICK, SCOTT,
CRAWLEY & PRICE

By: 
Jeffery R. Price
Michael E. Bostwick

Attorneys for Appellant
Paul F. Bliss dba Bliss Construction
Co., Inc.

Certificate of Service

I hereby certify that on this 14th day of January 2002, I caused to be served two (2) true and correct copies of the foregoing Reply Brief of Appellant upon counsel for Appellee by placing same in the United States Mail at Salt Lake City, Utah, first class postage prepaid, and correctly addressed as follows:

Mr. Gregory B. Hadley
Mr. James K. Haslam
HADLEY & ASSOCIATES
2696 North University Avenue, #200
Provo, Utah 84604